Filed 1/12/10 In re A.A. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re A.A. et al., Persons Coming Under the Juvenile Court Law.	B208759
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondent, v. H.H. et al., Appellants.	(Los Angeles County Super. Ct. No. CK71064)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth Kim, Juvenile Court Referee. Affirmed in part and reversed in part.

Rich Pfeiffer for Appellant H.H.

Joseph MacKenzie, under appointment by the Court of Appeal, for Appellant M.H.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Respondent.

H.H. (Mother) and M.H. (Husband) appeal from 2008 detention, jurisdiction, disposition and other orders made by the juvenile court pursuant to Welfare and Institutions Code sections 300 and 361.[1] The orders resulted in A.A. (Son, age 8) and K.H. (Daughter, age 2) being detained in the family home with Husband and in Mother being ordered to undergo an Evidence Code section 730 psychological evaluation (730 evaluation). After the appeals were filed, Mother underwent the 730 evaluation, and in 2009 the juvenile court returned the children to her custody and terminated its jurisdiction. The issues raised in this appeal are effectively moot. However, because the court's findings of detriment and its detention and disposition orders were not made in accordance with the proper legal standards, to avoid possible collateral prejudice to Mother we reverse the challenged orders without a remand for further proceedings rather than simply dismiss the appeal.

BACKGROUND

The Los Angeles County Department of Children and Family Services (the Department) detained Son and Daughter on December 13, 2007 based on allegations of failure to protect (§ 300, subd. (b)) and abuse of sibling (§ 300, subd. (j)). The allegations were founded on the report of Reverend Melissa M., with whom Mother had spoken two days earlier. Reverend M. reported that Mother told her she had murdered Ms. P, a friend's grandmother, by smothering her in her bed. It is undisputed this event did not occur in reality. The friend, Barbara A., reported and testified her grandmother, age 96, had been bedridden for 14 months before passing away in hospice of natural causes. Mother was the first to discover the body. No police report was taken, no one from the Department spoke with the police, and the Department did not allege Mother murdered Ms. P. When pressed about smothering the elderly woman, Mother told the pastor it had only been "a dream or something spiritual, but not reality."

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[1] Undesignated section references will be to the Welfare and Institutions Code.

Mother also told Reverend M. that Daughter was an "impossible" "little devil," and that she had suggested to Husband that they give Daughter to an aunt. She told Reverend M. that when Daughter was sick with a cold, after giving her a dose of Triaminic Mother put a partially full, 15 milliliter bottle of Liquid Dimetapp in her hand and left the room. Daughter drank the contents and had to be taken to the hospital for treatment. Finally, she told the pastor that she sometimes loses perception of time and has the sensation of being out of her body.

When the Department investigated, Mother admitted making these statements to the pastor but insisted the smothering incident had been only a dream, and when she called Daughter a little devil she meant only that she is a typical toddler. She also stated she did not give the Dimetapp to Daughter, but left it on a shelf out of her reach, and the child must have climbed to get to it. Mother stated she "initially" went to Son's room to ask for help, which the investigating social worker construed as Mother seeking his help in responding to the Dimetapp overdose. Mother ignored all questions regarding her suggestion that Daughter be given to an aunt.

Husband reported that Mother told him the smothering incident was a "vision that seemed real" that she experienced while in a fugue in the kitchen at midnight. "By the time [Mother] was back to reality, it was 2 am." Husband and Mother reported that Mother suffers from ADHD and bipolar disorder, was on stress leave from work, was seeing a therapist, had seen a psychiatrist in the past, and had been prescribed Lamictal 100 mg, Abilify 5 mg and Adderall 20 mg. Barbara A. reported Mother was under stress because a relative of her husband had passed away, because Daughter was "challenging," and because of the cost of living. Son confirmed that on the night Daughter drank the Dimetapp, Mother came to his room for a couple of seconds to get assistance. The investigating social worker again construed this as a request for assistance in dealing with the Dimetapp overdose.

Neither of the children showed signs of abuse or neglect.

The social worker concluded Mother's mental health posed a significant risk of serious physical and/or emotional harm to the children. The children were detained in the family home, with Mother moving out.

The Department filed a detention petition. In counts b-1 and j-1 it alleged Mother created a dangerous situation by leaving a bottle of medication within Daughter's reach. These counts were dismissed on March 5, 2008. The remaining count, count b-2, was eventually amended to allege: "[Mother] has mental and emotional problems, including situational depression and/or mood disorders. Further, due to mother's condition, the mother is unable to provide regular care of the children. Such mental and emotional condition on the part of the mother, endangers the children's physical and emotional health and safety, and places the children at risk of physical and emotional harm and damage."

The Department reported it had received letters from Patricia A. (a family friend and licensed therapist), Fran O. (a licensed clinical social worker and expert in the area of counseling, therapy and risk assessment, Dr. Leonard L. (Mother's psychologist), and Mother's child care provider, all of whom stated Mother posed no danger to the children. Dr. Leonard L. stated that in six years treating Mother he observed "no sign of mental crisis, nor any sign of a psychosis, nor any history of psychotic episodes. . . . [Mother] never showed any signs of mental crisis, and has never at any time given me any reason for concern for the safety of her children."

At the December 18, 2007 detention hearing the juvenile court found a prima facie case for detention existed pursuant to subdivisions (b) and (j) of section 300 and found Mother residing in the family home with the children posed a substantial risk of danger to their physical and emotional health. It ordered monitored visits for Mother.

On January 22, 2008 the Department filed a jurisdiction/disposition report containing multiple witness accounts to the effect that Mother did not give the Dimetapp to Daughter and did not seek Son's help after Daughter ingested it. Instead, she left the medication on a shelf out of Daughter's immediate reach and went to Son's room to ask him to read a story to Daughter to help her get to sleep. When she returned, she found

Daughter standing on a chair with the empty bottle in her hand. She contacted Husband and called the doctor, and they took Daughter to the emergency room.

Regarding Mother's mental issues, the jurisdiction/disposition report contained nothing new regarding Mother's mental and emotional issues except statements from Mother, Husband, F.A. (Mother's ex-husband and Son's father), and Daughter's maternal and paternal grandmothers to the effect that her issues did not adversely affect the children. The report contained a letter from Dr. Ebrahim H., another psychiatrist, in which he stated Mother had been under his care for 14 months, was being treated for "ADHD symptoms and some mood disorder," and has never shown any sign of thought or judgment disorder. She [has] never shown any psychotic symptoms. Vivid dreams [are] a common side effect of many psychotropic meds." The report also contained a letter from the children's pediatrician and declarations from Dr. Leonard L., Fran. O., and Barbara A., all supporting Mother's parenting ability.

The report indicated Son was well adjusted and doing very well in school and both children received regular medical care, were up to date with immunizations, and had no medical issues other than Son's asthma.

The contested adjudication hearing took place over several days. Reverend M. reaffirmed her report of Mother's statements to her. Barbara A. reaffirmed that Ms. P. had died of natural causes. Mother reiterated that what she told Reverend M. about smothering Ms. P. was only a dream.

On March 5, 2008, at the end of the Department's presentation of evidence, Mother's counsel, joined by counsel for Husband, F.A., and the children, moved that the petition be dismissed. The juvenile court granted the motion as to counts b-1 and j-1 and denied it as to count b-2.

Mother then presented evidence. She first attempted to show she was a good caretaker and posed no danger to the children. However, when she began to discuss her handling of the Dimetapp incident the Department objected on relevancy grounds, arguing it did not allege her mental issues either affected how she handled the Dimetapp incident or indicated she was unable to provide regular care for the children. The

objection was sustained. When Mother tried to explain why she wanted to give Daughter two different drugs for her cold, the Department again objected on relevancy grounds. The objection was sustained. When Mother tried to testify how she handled the children's bumps and scrapes, how she and Husband handled arguments outside the presence of the children, how Son was doing in school, how well nourished the children were, her ability to get the children to school on time, whether the children had clothing, how much she volunteered at their school, what their bedtime was, whether she used safety car seats for them, whether they engaged in social activities with other children, whether they had extracurricular learning activities, or whether they took family fieldtrips, the Department's relevancy objections were sustained.

Mother's counsel complained, "Again, Your Honor, are we not here saying my client suffers from such mental disorders that she can't provide regular care of her children? I'm showing in this instance not only does she provide regular care but a step beyond regular care. Is that not relevant to the case, Your Honor?" The court responded, "I've made my ruling. Mr. Powell, move on."

Fran O., the licensed clinical social worker and expert in the area of counseling, therapy and risk assessment, testified Mother's mental issues posed no risk to the children and Mother was not serious when she made a remark about giving Daughter to an aunt.

On March 12, 2008, at the close of evidence, counsel for Mother and counsel for Husband again moved that the remaining allegation in the petition be dismissed. The motion was denied.

The juvenile court found, without explanation, that amended count b-2 of the petition was true and the children were described by subdivision (b) of section 300. It ordered Mother to undergo psychological/psychiatric testing pursuant to Evidence Code section 730.

At the contested disposition hearing on May 21, 2008 only one witness was called, the social worker who had prepared the January 22 jurisdiction/disposition report and recommended that Mother be removed from the home and that her visitation be monitored. He testified he believed the children to be at risk based on Mother's

"behaviors," by which he meant her "mental health issues, including depression and other emotional problems," her allowing Daughter to ingest an overdose of Dimetapp, her disclosure to Reverend M. that she had smothered Ms. P., and her reference to Daughter as an unwanted devil child. But when asked whether he had any understanding as to whether Mother's reference to Daughter as a devil child or the remark about giving her away were serious statements "or the kind of jocular thing that people say sometimes about their children in the terrible two's," the Department objected that the question called for speculation. The objection was sustained.

Though he insisted Mother's ADHD and mood disorder rendered her unable to provide regular care for the children, the social worker admitted no evidence existed that she was unable to see to their schooling, nutrition, medical needs, shelter, safety, emotional health, or emotional or cognitive development. He was aware of no injury Mother had ever caused to either of the children.

When asked what risk Mother posed to the children, the social worker testified, "we don't know what she may do given the fact that she has emotional and mental problems." He testified a 730 evaluation was necessary to address mother's "behaviors" and "[t]he issues that the 730 exam would have brought out." When asked what issues those were, he said, "Whatever brought the mom to disclose to the priest the information" about smothering Ms. P., "whatever was behind the medication that the child ingested," and "whatever was behind the comments about the devil child." He admitted he had not contacted Fran O., who saw Mother regularly regarding her mental and emotional issues, or either of Mother's psychiatrists.

At the end of evidence counsel for Mother and counsel for Husband moved for the third time that the petition be dismissed. The Department argued Mother's statement to Reverend M. about smothering Ms. P. and her leaving medication for Daughter to find and open indicated "Mother does have ongoing emotional and mental problems, including situational depression[,] and it does affect her day-to-day living and her ability to care for the child."

The juvenile court declared the children to be dependents of the court. It found by clear and convincing evidence that "there is a substantial danger or would be if the children were returned home to the physical health, safety, protection, physical or emotional well-being of the children . . . ." It ordered that the children remain in the physical custody of Husband, that Mother continue to reside outside the family home, and that Mother submit to a 730 evaluation and continue in individual counseling and parent education.

On June 23 and July 17, 2008, respectively, Mother and Husband filed notices of appeal.

At some time after the disposition hearing Mother submitted to the 730 evaluation. On March 17, 2009 the juvenile court liberalized Mother's visitation rights and on March 24 and 25, 2009 granted her request to be permitted to return to the family home and terminated jurisdiction.

CONTENTIONS

Mother's notice of appeal indicates she appeals: (1) the declaration of dependency and removal of custody orders of March 5 and 11, 2008; (2) the "Detention Orders of 12/18/07; 1/22/08"; (3) "Disposition Orders of 3/12/08; 5/21/08"; (4) the "Denial of Rehearing: 4/2/08; 6/16/08"; and (5) the juvenile court's March 5, 2008 denial of her motion to dismiss count b-2. Mother also appeals from the court's orders of April 2 and June 16, 2008 denying her motions for rehearing. Those orders are not in the record. In her brief on appeal, however, Mother challenges only the juvenile court's March 12 finding of jurisdiction, its May 21 dispositional ruling, and orders requiring her to undergo a 730 evaluation. She abandons the other claims of error. (*Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 Cal. App. 4th 1460, 1480.)

Husband appeals all findings and orders of the court made on May 21, 2008 and the jurisdictional findings and orders made on March 12, 2008, as well as the order removing Mother from the home.

Mother and Husband contend the trial court erred in finding Mother's mental and emotional problems created a danger to the children.

Based on the March 24 and 25, 2009 orders terminating jurisdiction, we asked the parties to advise the court whether the instant appeal has become moot. In response, the Department contends it has and Husband contends it has not. Mother did not respond.

DISCUSSION

1. The termination of juvenile court jurisdiction renders the appeals moot.

"As a general rule, an order terminating juvenile court jurisdiction renders an appeal from a previous order in the dependency proceedings moot. [Citation.] However, dismissal for mootness in such circumstances is not automatic, but 'must be decided on a case-by-case basis.' [Citations.] [¶] 'An issue is not moot if the purported error infects the outcome of subsequent proceedings.' [Citation.]" (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1488.)

Here, the juvenile court terminated jurisdiction in 2009 and restored Mother's right to reside in the family home. Although these orders would seem to moot Mother's and Husband's appeals of 2008 orders, Husband contends the findings of endangerment upon which the challenged orders were based create the possibility of prejudice if the family is ever brought back into the juvenile dependency system. He also contends the sustained petition may result in he or Mother being listed on the Child Abuse Central Index maintained by the California Department of Justice, which could pose a barrier to them serving as foster parents, adopting children, or seeking training or licensing in certain professions. (See Pen. Code, §§ 11169-11170.5.) Husband's concern is speculative. "However, in an abundance of caution, and because dismissal of the appeal operates as an affirmance of the underlying . . . order[s] (*In re Jasmon O.* (1994) 8 Cal.4th 398, 413; C*ounty of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1005), we consider the merits of" the appeals. (*In re C.C.*, *supra*, 172 Cal.App.4th at p. 1489.)

2. The juvenile court's jurisdiction and disposition orders are unsupported by the necessary finding of potential harm to the children.

"Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 823 (*Rocco M.*).) The substantial risk of physical harm must result from "the failure or inability of [the child's] parent or guardian to adequately supervise or protect the child," the "failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness . . . ." (§ 300, subd. (b).) "Cases finding a substantial physical danger tend to fall into two factual patterns. One group involves an *identified, specific hazard* in the child's environment—typically an adult with a proven record of abusiveness. [Citations.] The second group involves children of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety. [Citations.]" (*Rocco M., supra*, 1 Cal.App.4th at p. 824 [11-year-old subject to risk of harm if placed in home allowing access to drugs].)

We review jurisdictional and dispositional orders for substantial evidence, viewing the record as a whole in the light most favorable to the juvenile court's order and indulging every inference and resolving all conflicts in favor of the court's decision. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.)

The sustained allegation was that Mother's mental and emotional problems rendered her unable to care for the children and endangered them. Neither the Department nor the juvenile court ever specified in what respect Mother posed a substantial risk to the children. As stated above, the risk must result from Mother's failure or inability to supervise or protect the children, failure to provide them with adequate food, clothing, shelter, or medical treatment, or inability to provide regular care. (§ 300, subd. (b).) In light of the Department's relevancy objections below to evidence that Mother adequately provided the children with food, clothing, shelter, medical

treatment, and regular care, we assume the allegation is that she failed or is unable to supervise or protect them. Mother and Husband argue the Department failed to establish a substantial risk of serious physical harm or illness to the children resulting from Mother's failure or inability to supervise or protect them. We agree.

Daughter and Son came to the Department's attention on grievous allegations that Mother had admitted to murdering Ms. P. and poisoning her unwanted "devil child." Upon investigation, however, it turned out Ms. P. had not been murdered—Mother had dreamed that; Mother did not think Daughter was a devil child—she thought Daughter was in her terrible two's; and Daughter had not been poisoned—in a moment of parental inattention she had climbed a chair to get to a bottle of grape flavored Dimetapp. The investigation also revealed Mother suffered from situational depression and a possible mood disorder for which she was receiving treatment.

The Department conceded Mother was able to get the children to school, feed them, and meet their medical needs. The home was clean and appropriate, the children were emotionally and cognitively unimpaired, and nothing suggested Mother had ever harmed them. It is undisputed that Mother handled the Dimetapp incident appropriately and that when she referred to Daughter as a devil child and remarked about giving her to a relative she was not serious, but rather was expressing the frustration many parents of two-year-olds sometimes feel. And Mother's husband, ex-husband, friend, mother, mother-in-law, ex-sister-in-law, childcare giver, therapist, and two psychiatrists insisted Mother presented no danger to the children. In sum, no evidence suggested Mother was a danger to the children, and a plenitude suggested she was not. True, Mother dreamed about murdering Ms. P. That is disturbing but not without explanation, as her psychiatrist explained that vivid dreams could be a side effect of her medication. No evidence in the record suggests this one-time dream endangered the children.

On appeal, the Department identifies five indicators that the children are at risk: Mother planned to overmedicate Daughter by giving her doses of both Triaminic and Dimetapp; Mother inadequately supervised Daughter, such that she was able to ingest a bottle of Dimetapp; after Daughter ingested the Dimetapp, Mother went to Son—eight

years old—for help rather than seeking Husband's help; Mother murdered Ms. P.; and Mother sometimes loses perception of time. We are unconvinced.

No evidence suggests Mother planned to overmedicate Daughter. Though Mother told Reverend M. she had planned to give Daughter doses of both Triaminic and Dimetapp, nothing suggests this would have been an overmedication, and the Department successfully blocked admission of any evidence that would have shown it was not.

No evidence suggests Mother murdered anyone.

No evidence suggests Mother sought Son's help in dealing with Daughter's Dimetapp overdose. Mother admitted to the investigating social worker that "she did initially go to [Son's] room (age 8) to ask for help." But it became clear that "initially" meant before Daughter ingested the Dimetapp, and the help she sought was in reading Daughter to sleep, not in dealing with the overdose.

No evidence suggests Mother's losing perception of time at midnight poses any risk to the children.

No evidence suggests Mother's leaving Daughter in a room with an accessible bottle of Dimetapp constituted more than an incident of momentary inattention. As the Department blocked inquiry into how Mother handled the situation (or into whether one such incident alone justifies juvenile court jurisdiction), it can hardly argue now that this one incident reflects an ongoing risk caused by Mother's mental or emotional issues. In short, nothing suggests the family home—with Mother in it—presents a greater risk than may be found in any normal home in which mischievous two-year-olds reside.

The juvenile court reasonably could have concluded that Mother had emotional and mental issues. But no substantial evidence supports even its jurisdictional finding, much less its dispositional finding, that those issues posed a substantial risk of serious physical harm to the children. The court therefore erred in finding such risk existed. It follows that it also erred when it ordered Mother to undergo a 730 evaluation.

DISPOSITION

The orders finding jurisdiction, finding the children were described by section 300, and ordering Mother to undergo a 730 evaluation are reversed. The other orders are affirmed. In light of the subsequent events in this case, no remand for further proceedings is necessary.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.